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417-974—71——1

CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 758

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. RYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 71–73) [1] is reported at 430 F. 2d 658.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1970 (A. 74). A petition for rehearing with suggestion for rehearing en banc was denied on July 29, 1970 (A. 75). On September 2, 1970, pursuant to a motion filed on August 28, Mr. Justice Mar-

[1] "A." refers to the Appendix in this Court. "R." preceded by volume number refers to the certified transcript of record on file with the Clerk.

shall extended the time for filing a petition for a writ of certiorari to September 27, 1970. The petition was filed on September 26, 1970, and was granted on January 18, 1971 (A. 75). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's order denying respondent's motion to quash a grand jury subpoena requiring production of records maintained under his control in a foreign country was rendered appealable because, as to some of the records, the district court limited respondent's obligation to taking certain steps looking toward production.

2. If so, whether the court of appeals erred in holding the order invalid.

STATUTES INVOLVED

28 U.S.C. 1291 and 1292(a)(1) provide in pertinent part:

> § 1291. *Final decisions of district courts.*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * [with an immaterial exception].
>
> § 1292. *Interlocutory decisions.*
>
> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States * * * granting, continuing, modifying, refusing or dissolving

injunctions * * * [with an immaterial exception];

* * * * *

STATEMENT

On March 5, 1968, a federal grand jury in the Central District of California, sitting in Los Angeles, issued a subpoena *duces tecum* directing respondent Ryan, a citizen of the United States, to produce before it on April 15, 1968, all books, records, and documents of five named companies doing business in Kenya (A. 9, 11–12). Respondent moved to quash the subpoena, claiming, *inter alia,* that compliance would be oppressive and unreasonable, and that removal from Kenya of certain of the records would violate a Kenya law prohibiting removal of corporate books of account, minute books, and lists of members without the consent of the Registrar of Companies (1 R. 10–11, ~~51–55~~). Following proceedings over a period of several months, the district court on July 25, 1968, found that respondent had control of the records of two of the named companies (Ryan Investments, Ltd. and Mawingo, Ltd., doing business as the Mount Kenya Safari Club),[2] and denied the motion to quash as to

[2] The precise language of the district court's finding was "that petitioner Raymond J. Ryan at times before and after commencement of the investigation by the Treasury Department and Department of Justice has had control of the records, papers, and documents referred to by the subpoena duces tecum * * *" (A. 63). Certain of these records, which respondent had stored in Palm Springs, California, had been produced by him pursuant to an earlier grand jury subpoena, issued in July 1967.

those records, requiring their production before the grand jury on September 11, 1968 (A. 63–64). The court, however, made an exception as to the "books of account, minute books and list of members" because of the restrictions of Kenya law. With respect to these, the July 25 order directed respondent to request permission from the Registrar of Companies in Kenya for their production in Los Angeles on the return date; should such permission be refused, respondent was directed to make those records available for inspection and copying by United States agents in Kenya (A. 64). The judge had indicated a willingness to include in his order a government offer to relieve respondent of transporting *any* of the records from Kenya (the records originally subpoenaed were claimed by a witness for respondent to weigh some 2,000 pounds (1 R. 45)) by having federal agents, on the grand jury's behalf, inspect and copy them in Kenya. Respondent declined the offers (A. 52–62; 1 R. 65–66).

Following the filing of a notice of appeal from the district court's action (and before the return date), respondent sought extraordinary relief in the court of appeals to prohibit enforcement of the district court's order and for a stay of proceedings. After oral argument the court of appeals denied the requested relief, but extended the return date to September 23, 1968.[3] The appeal itself remained pending.

On September 23, 1968, respondent appeared before the grand jury as ordered, but otherwise disobeyed the

[3] The court of appeals' order is set forth at pp. 21–22 of the petition. Respondent made a further application to the Circuit Justice, who also refused to stay the proceedings.

district court's order. He had failed to produce the records not subject to the limitations of Kenya law, had not applied to Kenya authorities for release of the specified records, and had not made any records available for inspection and copying in Kenya. The district court ordered respondent to show cause why he should not be held in civil contempt for his noncompliance. In connection with that proceeding, the court allowed respondent to issue letters rogatory to two witnesses in Kenya claimed to be necessary to his defense. On December 10, 1968, shortly before the term of the grand jury was to expire on December 21, the show-cause order, was converted (on application by the government) into an order to show cause why respondent should not be held in criminal contempt. On October 20, 1969, the court of appeals stayed the criminal contempt proceeding pending decision of the appeal from the district court's action on the subpoena (4 R. 3–4);[4] that criminal contempt proceeding is still pending.

Seven months later, on May 19, 1970, the court of appeals set aside the district court's order of July 25, 1968. The court held that, since the order provided for affirmative action in Kenya as to some of the records, it "did more than deny a motion to quash; it in effect granted a mandatory injunction which, given

[4] The court of appeals contemporaneously stayed the trial of respondent on a charge of obstructing justice (18 U.S.C. 1503) by falsifying certain records which respondent had produced pursuant to an earlier grand jury subpoena (4 R. 4–14). Subsequent to the court of appeals' decision in this case, respondent was tried and convicted on the obstruction of justice charge. A. 67

full effect, would require action by officials of the Kenyan Government." The court concluded that the entire order (including the part leaving some of the subpoena undisturbed) was therefore appealable as an interlocutory injunction under 28 U.S.C. 1292(a)(1) (A. 72). Treated as an injunction, the court found that the order was defective for not stating with sufficient particularity what respondent was expected to do. It also found the order oppressive in that respondent's "compliance would require him to transport 2,000 pounds of records at his own expense from Kenya," and otherwise overbroad in scope. The court expressed the view that the need for a subpoena could have been obviated by the use of letters rogatory (A. 72–73).[5]

SUMMARY OF ARGUMENT

I.

The decision below is a substantial departure from the principle of *Cobbledick* v. *United States,* 309 U.S. 323, that district court orders denying motions to quash grand jury subpoenas cannot be appealed. Indeed, it is a particularly anomalous departure in this case since the order modifying the subpoena

[5] The court stated in its opinion that "letters rogatory are now being pursued by the Government" (A. 73). The only letters rogatory relating to the present case are those of respondent, issued in connection with his defense to the contempt proceedings. In connection with those letters rogatory, the government has submitted cross-interrogatories to be propounded to respondent's witnesses, including a request that the witnesses produce documents; it is, perhaps, these cross-requests that caused the court of appeals' statement.

sought to minimize difficulties respondent might encounter in complying with the grand jury command. Other situations may arise where auxiliary commands are necessary. Faced with the ruling below, which can be read as considering such auxiliary directives dispositive on the question of appealability, district courts will obviously be reluctant to modify subpoenas for fear that to do so will open the door to immediate appeals and attendant obstruction of grand jury investigations.

A. This Court in *Cobbledick* held an order denying a motion to quash nonappealable in furtherance of longstanding notions of finality, particularly in the criminal context where "encouragement of delay is fatal to the vindication of the criminal law" (309 U.S. at 325). It found that there was no compelling reason to depart from these principles since full review as to the validity of the subpoena would be available if, and when, the balking witness was subsequently held in contempt. This Court has since explicitly recognized the vitality of the *Cobbledick* rule of finality in a wide variety of cases including the grand jury context (*e.g., DiBella* v. *United States,* 369 U.S. 121). It has also, in an analogous line of decisions, reaffirmed the long-established proposition that, to carry out their unique and vital investigatorial powers, grand juries must remain unfettered by limitations which apply in the adversary context. *E.g., Costello* v. *United States,* 350 U.S. 359. It seems clear therefore that had the district court done no more than refuse to quash the subpoena in this case, its

order, under familiar principles, would not have been appealable.

B. There was no reason to apply a different rule in this case because the district judge felt that compliance would be aided by modifying the subpoena to require respondent to take "affirmative action" "in a foreign country." We fail to understand why such modification by the district court—obviously prompted by a desire to take account of certain objections raised by respondent and thereby to make compliance less burdensome—makes the order appealable. As we show neither logic nor precedent supports this distinction.

Moreover, the court of appeals' invocation of an appellate remedy under 28 U.S.C. 1292(a)(1), by labelling the order a "mandatory injunction," is inconsistent with the strict limitations on such appeals. That statutory provision has been narrowly applied by this Court in civil cases (*e.g., Switzerland Cheese Association, Inc.* v. *Horne's Market,* 385 U.S. 23) in the overriding interests of finality. *A fortiori* the provision should be inapplicable when dealing with grand jury investigations. Compare *Younger* v. *Harris,* No. 2, this Term, decided February 23, 1971.

C. There are no special circumstances in this case which justify a deviation from *Cobbledick.* The very incorrectness of the reasoning below creates a real danger that its rule will be applied in an uncritical

fashion. There is no persuasiveness in the possible argument that since the district court refused to grant a stay, the grand jury process was not actually disrupted. Unless the decision below is reversed, it takes little imagination to foresee disruption in other cases where stays will be regularly sought and obtained. This case, therefore, poses no fanciful danger of interference with the grand process; rather it has a real potential for disruption of an investigative proceeding which has always loomed so significantly in our history. To sustain the decision below can, in short, lead only to delay in the grand jury investigation and interfere with its traditional and vital functions.

II.

Even assuming *arguendo* that the order was appealable, the court below erred in finding it defective. We show that, as modified, the subpoena was neither overbroad nor oppressive and the order fully apprised respondent of his obligations (see *infra*, pp. 26–31).

ARGUMENT

I.

THE ORDER REFUSING TO QUASH THE GRAND JURY SUBPOENA *DUCES TECUM* WAS NOT MADE APPEALABLE BY ITS PROVISIONS EASING THE BURDEN OF COMPLIANCE

The court of appeals left little doubt that had the district court simply let the subpoena *duces tecum* stand it would have refused to entertain the appeal.

Yet because the district judge deemed it appropriate to modify the subpoena with respect to the production of a limited class of records in an obvious effort to take account of respondent's objections and make compliance less burdensome, the order, in the words of the opinion below, was transformed into a "mandatory injunction" appealable under 28 U.S.C. 1292(a)(1). This result can be supported neither in precedent nor logic. Unless overturned, it seriously threatens the functioning of grand jury proceedings.

A. An order refusing to quash a subpoena is reviewable only after an adjudication of contempt for disobeying it.

1. Thirty years ago in *Cobbledick* v. *United States*, 309 U.S. 323, the Court was faced with the issue whether district court orders denying motions to quash grand jury subpoenas *duces tecum* were "final decisions of district courts" and, as such, reviewable under what is now 28 U.S.C. 1291. In setting the framework for its ultimate conclusion that they were not—that the only way review of such orders could be had was on appeal if the witness was held in contempt for failing to obey—the Court relied upon historic tradition[*] and weighty considerations of policy. Its summary of these principles deserves repetition (309 U.S. at 325–326):

> Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the

[*] The statutory requirement of finality was contained in the first Judiciary Act. 1 Stat. 73, 83–85, Sections 21, 22, and 25 of the Act of September 24, 1789.

> very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases [footnote omitted]. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. * * *

Cobbledick (unanimous except for the non-participation of a single Justice) found the foregoing considerations compelling in the context of grand jury proceedings, which it recognized to be at the core of an effective criminal justice system (*id.* at 327–328):

> * * * The Constitution itself makes the grand jury a part of the judicial process. * * * The

> proceeding before a grand jury constitutes "a judicial inquiry" * * * of the most ancient lineage. * * * The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the "orderly progress" of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander case.* [1] Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. * * *At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. * * *

Cobbledick accordingly established the firm principle that the interest in avoiding delay overrides the interest of a grand jury witness in interlocutory appellate review of the obligations imposed upon him by a subpoena.

2. In the years since, the lower courts have uniformly applied the *Cobbledick* rule where attempts have been made to seek review of orders denying motions to quash

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[1] *Alexander* v. *United States*, 201 U.S. 117, held interlocutory and nonappealable an order to a witness to answer questions and produce documents in a civil suit by the United States under the antitrust laws.

grand jury subpoenas. See *e.g.*, *Lampman* v. *United States District Court*, 418 F. 2d 215 (C.A. 9), certiorari denied, 397 U.S. 919; *In re Buckey*, 395 F. 2d 385 (C.A. 6); *In re Grand Jury Investigation of Violations*, 318 F. 2d 533 (C.A. 2), petition for certiorari dismissed, 375 U.S. 802. *Dugan & McNamara* v. *Clark*, 170 F. 2d 118 (C.A. 3).[8]

Nor has this Court cast any doubt upon the continuing vitality of the *Cobbledick* rule. Rather, it has reaffirmed its rationale in a wide variety of contexts.[9] Thus, in *DiBella* v. *United States*, 369 U.S. 121, the Court held that a motion to suppress evidence, even

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[8] But compare *Continental Oil Co.* v. *United States*, 330 F. 2d 347 (C.A. 9), where another panel of the Ninth Circuit earlier held that an order to quash a grand jury subpoena was reviewable either by way of appeal or through an extraordinary writ, but did not choose between these remedies. To the extent that *Continental Oil* held that the order might be reviewable by way of appeal it was plainly erroneous under *Cobbledick*—as the later panel decision in *Lampman*, *supra*, 418 F. 2d at 216–217 expressly recognized. Nor is such relief available by extraordinary writ, see *Will* v. *United States*, 389 U.S. 90; *Lampman* tacitly conceded as much (418 F. 2d at 217).

[9] See *e.g.*, *Corey* v. *United States*, 375 U.S. 169, 176; *Andrews* v. *United States*, 373 U.S. 334, 340; *Will* v. *United States*, 389 U.S. 90, 96; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306; *DiBella* v. *United States*, 369 U.S. 121, 124; *Parr* v. *United States*, 351 U.S. 513, 518, 520; *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438; *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30.

For example, in *Andrews*, *supra*, 373 U.S. at 340, the Court observed that [t]he "long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court [citing, *inter alia*, *Cobbledick*]."

though filed before the return of an indictment, was not separate from the main cause and thus not independently appealable: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." 369 U.S. at 131–132. In reaching this result, the Court relied upon the *Cobbledick* principle that grand jury procedings "are parts of the federal prosecutorial system leading to a criminal trial" (369 U.S. at 131); it emphasized that postponing appeal until after conviction would not "frustrate the right of appellate review * * *" (*id.* at 125–126). And in a complementary context, the Court has reinforced the unique status of the grand jury and its power to engage in broad ranging investigations unfettered by litigious interruptions. Thus, the Court has precluded challenges to indictments as based on inadmissible evidence (*Costello* v. *United States,* 350 U.S. 359) or obtained in an unconstitutional manner (*Lawn* v. *United States* 355 U.S. 339). "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment" which may have been presented to a grand jury, a defendant may not obtain dismissal of an indictment but "would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." *United States* v. *Blue,* 384 U.S. 251, 255.

These developments in the years since *Cobbledick* give firm evidence of its continued vitality. Thus, had the district court in this case simply *refused to quash*

the subpoena, its decision would incontestably have amounted to no more than an interlocutory nonappealable order. There is no justification for disregarding the principle of *Cobbledick* because the district court in this case tempered its refusal to quash the subpoena with terms designed to make compliance by respondent less burdensome.

B. *The district court's order modifying the subpoena did not render the order appealable.*

In its order refusing to quash, the district court modified the subpoena, insofar as it demanded "the books of account, minute books and the list of members," to accommodate the restrictions of Kenyan law. In substance, the order provided that respondent need not produce these documents in Los Angeles unless his request for permission to do so was granted by the authorities in Kenya; if respondent was unable to obtain such permission, these papers need only be made available for inspection and copying in Kenya. The court below found that this abridgement of the subpoena transformed the order from a denial of the motion to quash into a "mandatory injunction" superseding the subpoena and having an appealable life of its own. It is literally true, we agree, that the modification did direct the respondent to take certain steps looking toward the production of the documents. But we can perceive no logical or practical sense in which the basic situation was changed; all that happened was that the subpoena's categorical directive to produce was replaced by the court's directive to do the best that the circumstances allowed by way of produc-

tion. Unless unrealistic formalism is to govern, the *Cobbledick* principle must control here as in any other situation where the issue is what evidence the grand jury is to be allowed to obtain, and therefore an appeal did not lie.

1. It is inherent in any subpoena *duces tecum* that the person called on to produce the records must take "affirmative action" of some kind to comply. If the books are maintained in a warehouse, he must get them out of the warehouse. If they are in the custody of another, he must ask that person to surrender them. If, for example, corporate records are stored in a bank vault, the officer ordered to produce them must secure the cooperation of the custodian of the vault, complying with applicable bank regulations. Sometimes, as where a subpoenaed individual has partial but not exclusive control over the desired records, considerable efforts may be necessary to establish good-faith compliance. See, *e.g., United States* v. *Fleischman,* 339 U.S. 349, 352–365, where the Court held that the subpoenaed members of the executive board of an association, who collectively had power to direct production of the subpoenaed records by the officer in whose custody they were (though none individually had the authority to do so), were required to meet and issue such an order.[10] Cf. *Wilson* v. *United States,* 221 U.S. 361, 376–377.

[10] *Fleischman* did not involve a grand jury subpoena and no question was involved as to the appealability of a refusal to quash. We refer to that case merely to illustrate the type of situation which could well arise and in which, in our view, an order refusing to quash would not be appealable even though

We think the bank vault illustration provides a useful analogy: Assume that in order to forestall foreseeable delay a federal district court in Los Angeles were to couple a refusal to quash a grand jury subpoena with a direction that the witness "shall forthwith make application to Bank X in New York City to release designated records and if permission is refused to permit agents of the grand jury to examine and copy the records at the Bank." It is hard for us to believe that in such a situation the otherwise unappealable order would be transformed into an order subject to review on the ground that "affirmative action" was commanded. On the contrary, it seems evident that the language of command in the hypothetical situation was simply meant to take account of foreseeable "footdragging" and to make explicit what was already implicit in the subpoena itself—that all reasonable efforts be taken to comply with its terms.[11]

a more than ordinary degree of affirmative action would be required for compliance.

A further example illustrates the fundamental proposition referred to in the text. If no implicit directives could be read into a subpoena, a corporation could presumably insulate its books and records from production simply by appointing as a custodian one who could assert the personal privilege against self-incrimination. Thus, through its own devices, a corporation could effectively assert the "personal" privilege against self-incrimination, cf. *United States* v. *Kordel*, 397 U.S. 1, 8, thereby evading the plain command of a subpoena and frustrating a grand jury investigation.

[11] Compare Mr. Justice Black's discussion of *Wilson* v. *United States*, 221 U.S. 361, in his dissenting opinion in *United States* v. *Fleischman*, *supra*, 339 U.S. at 369–370, in which he notes the importance of the factual context in analyzing the terms of a subpoena—particularly the special situation of grand jury proceedings.

The difference between the directive which we have postulated and the case at hand does not justify a different rule of appealability. We fail to perceive why the fact that "affirmative action" was required "to be taken in another country"—that respondent was directed to seek the permission of the foreign authorities for removal of certain of the records, or, if that failed, to make the records available for examination and copying by federal agents in Kenya—has any bearing on that question at all,[12] much less why it requires a conclusion favoring appealability. In short, given the particular circumstances of this case, the prescribed procedure—obviously aimed at taking account of objections raised by respondent at the hearings on the motion to quash and to afford him leeway in achieving compliance before the return date—was

[12] We further fail to understand why the court concluded that, if "given full effect," the order would "require action by officials of the Kenyan Government"—or even if it did why this was significant on the question of appealability. Any action that the government of Kenya might have taken pursuant to a request made on it by respondent would obviously have been wholly voluntary on its part; the district court did not—and could not—direct Kenyan authorities to do anything.

It is further immaterial that the records here sought by the grand jury (including those whose production did not require the Kenyan Government's approval) were maintained outside the United States. The courts of this country have power to order persons subject to their jurisdiction to produce in this country books and records, located in a foreign country, that are within the control of such persons. See, *e.g.*, *Societe Internationale* v. *Rogers*, 357 U.S. 197, 204–205; *United States* v. *First National City Bank*, 379 U.S. 378; *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 217 (C.A. 9).

simply a reasonable implementation of the subpoena and strictly in aid of it. See *National Nut Co. of California* v. *Kelling Nut Co.*, 134 F. 2d 532, 533 (C.A. 7).[13]

2. In holding the district court's entire order immediately appealable, the court of appeals disregarded the fact that its principal command was that respondent produce before the grand jury the records sought by the subpoena—in short that the dominant thrust of the order was simply to deny the motion to quash.[14] Surely that portion of the order which required no application to foreign authorities would under no theory have been subject to review if it had stood alone. Why

[13] Cf. *Securities and Exchange Commission* v. *Minas de Artemisa*, 150 F. 2d 215, 218–219 (C.A. 9), where a subpoena *duces tecum* requiring production within the United States of corporate records held in Mexico was ordered restructured to comply with Mexican law by providing that the officer ordered to produce them should seek Mexico's permission to remove any records whose removal would otherwise violate the laws of that country and that, should the requested permission be denied, he make the records available in Mexico for inspection by the subpoenaing party. Accord: *United States* v. *Ross*, 302 F. 2d 831, 834 (C.A. 2); *In re Investigation of World Arrangements, etc.*, 13 F.R.D. 280, 286–287 (D.D.C.). See also *Societe Internationale* v. *Rogers*, 357 U.S. 197, 205.

[14] Thus Part I of the district court's order denied the motion to quash and Part II directed compliance with regard to the records of the two companies in question—except as to "the books of account, minute books and the list of members"; only in Part III did the court modify the subpoena in a manner in which the court below deemed crucial on the question of appealability in providing the conditions regarding production of these specified records (A. 63–64). We think it fair to assume that had the district court stopped with Points I and II (the latter point having eliminated the records of certain companies from the reach of the subpoena) no appeal would have been allowed.

should it be any different because the court sought to provide flexibility in production as to the remainder?[15]

Following the logic of the court below, it would appear that any ameliorative or clarifying directive, if it directs some kind of "action" beyond the express terms of the subpoena, will render the entire subpoena appealable. Yet it is apparent that many situations will arise where such auxiliary orders are essential. In this case the basic aim of the district court was to afford leeway in achieving compliance; in other situations, the order may seek to make the subpoena more precise, thereby clarifying or perhaps narrowing the witness' duty. That a district judge be encouraged to exercise such power seems to us of paramount importance—if for no other reason than to protect a witness from overbroad or oppressive subpoenas.

If the opinion below is allowed to stand, a district judge, cognizant that any order on his part modifying a subpoena, no matter how subsidiary, may well be subject to immediate review, will obviously be reluc-

[15] *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, does not point in the other direction. That case—which involved no issue concerning appealability since the party seeking review had been found guilty of contempt—merely held that since a portion of the subpoena seeking pretrial discovery of government documents under the criminal discovery rules was bad, the defendant could not be held in contempt for refusing to comply with the subpoena even though the remainder may have been valid (see 341 U.S. at 221–222). The implications of *Bowman*, however, are that the district court in that case should and could have acted to remove the basis of invalidity.

tant to make any revision tailoring the subpoena's terms to the particular circumstances for fear of the delays in the grand jury's investigation that would flow from the interlocutory review. To place a district court in such a dilemma can aid neither the witness nor the government; it can only detract from the flexibility necessary to effective and fair criminal procedures.

3. The court of appeals' alacrity in converting the district court's order into an injunction appealable under 28 U.S.C. 1292(a)(1) is, moreover, inconsistent with the general policy of limited appealability governing interpretation of that statute. This court has made clear that Section 1292(a)(1) is to be given restrictive rather than broad application, consistent with the sound principle that ongoing litigation should not ordinarily be interrupted by interlocutory appeals. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180–182. This principle was reemphasized in the Court's recent decision in *Switzerland Cheese Association, Inc.* v. *Horne's Market*, 385 U.S. 23, that an order denying a motion for summary judgment in a civil action was not appealable under Section 1292(a)(1). The Court significantly commented that "federal law expresses the policy against piecemeal appeals" and that it therefore approached "this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders." 385 U.S. at 24. Reference to Section 1292(a)(1) accordingly reinforces the argument against appeal in this case. For as *Cobbledick* has

stressed, the reasons militating against review of interlocutory orders "are especially compelling in the administration of criminal justice." 309 U.S. at 325.[16] See *Younger* v. *Harris*, No. 2, this Term, decided February 23, 1971.

C. *There are no special circumstances in this case justifying a departure from the finality doctrine.*

We have so far focussed on the anomalous nature of the decision below, pointing out that it can only encourage the kind of delay which is "fatal to the vindication of the criminal law," *Cobbledick, supra*, 309 U.S. at 325, or else tend to inhibit the exercise by district courts of the discretion upon which the smooth and fair operation of our system of criminal justice so much depends. See, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353.

It may, however, be contended that this case involves a unique combination of factors that collectively call for special treatment, and that this uniqueness diminishes the threat to the *Cobbledick* principle. We shall endeavor to show that there is no reason for an exception here, and that the principle followed below does create a danger of broad application.

1. As we have already contended, the fact that efforts to obtain demanded records must be made on foreign

[16] The Ninth Circuit's reliance upon *Longshoremen* v. *Marine Trade Assn.*, 389 U.S. 64, is misplaced. That case involved the question whether an equitable order granting an injunction in a labor dispute (the violation of which resulted in the contempt finding) was sufficiently clear to warrant the civil contempt ruling. The decision did not purport to deal with Section 1292 (a)(1) or any question of interlocutory review.

rather than domestic soil is hardly a viable basis for a meaningful distinction on the issue of appealability (see *supra*, p. 18–19). Nor is the assertion that the records weighed 2,000 pounds rather than a lesser amount relevant to that question. There is, furthermore, a real danger inherent in the court of appeals' attempted distinction between this case and its earlier holding against appealability in *Lampman, supra,* on the ground that the order in that case "cannot be fairly compared, in breadth, reach, or overseas effect, to the one that is now before us" (A. 72, n. 1). Such distinctions are easily asserted in the abstract but are difficult of practical application consistent with appellate restraint. They do not create a readily identifiable class of cases as to which appeals will be allowed, and accordingly invite litigation of the issue, and attendant stays, in an especially wide class of cases.

2. The further point may be made that the investigative process of the grand jury was not substantially disrupted in this case since the court of appeals decided not to restrain enforcement of the district court's order pending appeal.[17] The contempt proceeding itself has, however, been delayed since October 20, 1969, on application of respondent, and has thus remained in abeyance for almost a year and a half; the documents have, of course, not been produced. From no point of view has fair resolution of the issues in the contempt proceedings been aided or

[17] It should be noted, however, that the court of appeals did postpone the return date for a period of nearly two weeks due to the delay occasioned by the application for extraordinary relief. See *supra*, p. 4.

expedited by this 17-month maintenance of the status quo; the opposite has been true.

In any event, the fact that the court of appeals in this case decided in its discretion against granting a stay pending the appeal is hardly a guarantee that other courts, in comparable situations, would not stay proceedings in other cases. On the contrary, if the order at issue here is found to be appealable, it can be predicted with fair assurance that stays will regularly be sought and often obtained. Many will appeal who, if put to the test of risking citation for contempt, would acknowledge the correctness of the enforcement order and produce the records commanded. Indeed, with the fear of a contempt citation removed, appeals may be used simply as instruments of delay. Given the short life of the grand jury (18 months at the longest, Rule 6(g), F. R. Crim. P.) relative to the life expectancy of an appeal (here almost two years in the court of appeals alone), it will often be possible to frustrate the demand for information entirely. And, even if interim relief is denied, the mere pendency of an appeal challenging the validity of a district court's order could substantially diminish the fear that non-compliance would result in punishment.[18]

[18] We note further that any rule which permitted an appeal from an order entered prior to a contempt order would leave the door open for a witness to prosecute two appeals on identical issues. A recalcitrant witness might appeal from the first order and, if unsuccessful, might continue to refuse to comply with the order and appeal from an order adjudging him in contempt. As a consequence, there could be two appeals on

3. We are thus forced to the conclusion that the court below held the instant order appealable simply because it deemed the subpoena oppressive and unfair. Whether it was or not (we discuss why it was not in Point II, *infra*), this is surely no basis for holding it to be appealable. It cannot be argued "that a judge has no 'power' to enter an erroneous order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will* v. *United States*, 389 U.S. 90, 98, n. 6.[19] As *Cobbledick makes* clear: "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." 309 U.S. at 325.[20] "Courts * * *

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issues which could be fully disposed of on appeal of the final order adjudging him in contempt. Ordinarily such a possibility would appear to be more fanciful than real. However, in the case of grand jury investigations, it would provide an opportunity to obstruct justice and pose a real danger. Compare *Younger* v. *Harris*, No. 2, this Term, decided February 23, 1971, where, in reaffirming the traditional rule against federal court intervention in state criminal prosecutions, the Court recognized that a fundamental reason for the rule was to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (slip op. 6).

[19] The Court in *Will* (389 U.S. at 98 n. 6) further quoted with approval Mr. Justice Douglas' remarks in dissent in *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 225, that "[c]ertainly Congress knew that some interlocutory orders might be erroneous when it chose to make them non-reviewable."

[20] Undergoing a criminal prosecution thus cannot be a basis for bringing this case within the small category of situations where important rights, collateral and discrete from the main cause, require immediate review. See, *e.g.*, *Cohen* v. *Beneficial*

must be careful lest they suffer themselves to be misled by labels * * * into interlocutory review of nonappealable orders on the mere ground that they may be erroneous" (*Will* v. *United States, supra,* 389 U.S. at 98 n. 6).[21] "The Supreme Court scarcely intended that the important policy pronouncements in Cobbledick and Di Bella could be side-stepped by baptizing a motion to quash as one to enjoin the prosecutor from enforcing a subpoena, or a motion to suppress as one for an injunction restraining the use of the evidence and mandating its return * * *." *In re Grand Jury Investigation of Violations, supra,* 318 F. 2d at 536.

II.

ASSUMING ARGUENDO THAT THE ORDER WAS APPEALABLE, THE COURT BELOW ERRED IN HOLDING IT INVALID.

Our central concern with the decision below (as we noted in our petition for certiorari, pp. 8–9 n. 8) is the potential adverse impact of its holding on appeal-

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Loan Corporation, 337 U.S. 541. Indeed, at the core of these decisions is the consideration of "the likelihood that review will be ineffective if delayed." See Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 364 (1961). There is nothing to suggest that such will be the case here if the contempt proceeding is allowed to proceed and results in a finding of contempt against respondent.

[21] That warning, given in another context, is telling here. Just as mandamus and the other extraordinary writs may not be employed as substitutes for appeal in derogation of a clear congressional policy against allowance of review, *Will* v. *United States, supra,* 389 U.S. at 97; *Parr* v. *United States,* 351 U.S. 513, 520–521; *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 30–31; cf. *Fong Foo* v. *United States,* 369 U.S. 141, so the prohibition against appeals from defined types of orders is not to be circumvented by calling them by other names.

ability. We have detailed our reasons for this view in Point I of this brief, and would urge the Court to reverse on this ground without reaching the merits. Nevertheless, the court below did reach the merits [22] and, accordingly, we deem it appropriate to deal briefly with the substance of its ruling.

1. As originally issued, the grand jury subpoena required the production of all records pertaining to five named entities—Ryan Investments, Ltd., Mawingo, Ltd., the Mount Kenya Safari Club, Zimmerman, Ltd., and the Seven-Up Bottling Co. (Kenya), Ltd. (A. 11–12). In an affidavit submitted in support of the motion to quash the subpoena, John Mills, a director of three of these companies (Ryan Investments, Mawingo, and Zimmerman), attested that on the basis of his personal knowledge of the records of the first four entities named (all except the Seven-Up Bottling Co.) it was his opinion that the records would fill approximately eight four-drawer filing cabinets and weigh approximately 2,000 pounds (1 R. 45). This statement was the apparent basis of respondent's later claim in these proceedings that the records ordered produced would weigh 2,000 pounds, and apparently was one of the factors which impelled the court below to rule that the subpoena was oppressive in scope.

We point out initially that the government had offered during the proceedings to relieve respondent

[22] There is, of course, no reason for this Court to reach the merits simply because the court of appeals did. If the court below is thus found to have acted without jurisdiction, its substantive rulings could not have any binding force on the district court. See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394.

of the necessity for transporting any of the subpoenaed records to Los Angeles, by having federal agents, on the grand jury's behalf, inspect them in Kenya and copy those that were deemed necessary; the court had indicated its willingness to include the substance of that proposal in its order. Having declined the offers (*supra*, p. 4), respondent is hardly in a position to argue that the order imposed an unreasonable transportation burden.

At all events, whatever might be said as to the burden of the subpoena standing alone, it was surely made reasonable in scope by the narrowing order of the district court. It appeared from other statements in Mills' affidavit (and in a second affidavit submitted in support of the motion to quash by one John Story, a Kenyan accountant) that Ryan Investments was incorporated on December 6, 1961; that Mawingo was incorporated on June 5, 1938; that the Mount Kenya Safari Club was a wholly owned affiliate of Mawingo, with no separate corporate existence; and that the Safari Club "began to be operated by its owner Mawingo" on May 20, 1963 (1 R. 40–41, 45). In its answering memorandum, the government noted that Ryan Investments had been in existence only since December 1961 and that it had been established through grand jury testimony that respondent "became involved with the Mount Kenya Safari Club, dba Mawingo Limited [*sic*]" in January 1959. It argued that "[t]hese dates clearly show that the records covered by the subpoena do not envelop an unreasonable period of time," and suggested that in the inter-

est of clarity the subpoena should be modified to "specifically include these dates which have not been challenged by Mr. Ryan" (1 R. 68).

Although the district court did not literally incorporate the government's suggested modification, it did incorporate the substance of that proposal. In addition to eliminating entirely the reference to the records of two of the designated companies (Zimmerman, Ltd. and the Seven-Up Bottling Co.), the court significantly varied the references to the other three entities. Whereas the subpoena had referred to Ryan Investments, Mawingo, and the Mount Kenya Safari Club as separate organizations, the order omitted reference to the Mount Kenya Safari Club as a separate entity and qualified the reference to Mawingo with the words "doing business as the Mount Kenya Safari Club" (A. 63–64). Thus, instead of calling for all the records of Mawingo, as the subpoena had, the order directed the production of only those records of Mawingo that were pertinent to the period during which it had done business as the Mount Kenya Safari Club. Whether that period commenced in May 1963 (when according to the affidavit of Mills the Safari Club began to be operated by Mawingo) or in January 1959 (when according to the evidence referred to in the government's memorandum respondent had become involved with the Club), it covered, at most, a span of nine and a half years. The actual facts therefore do not bear out the unequivocal assertion of the court below that "[t]he Government conceded that the subpoena itself was overly broad, but the District Court

did not undertake to clarify it or to limit it, except to remove only a few documents from its attempted operation" (A. 73).

Fairly interpreted, the district court's order required the production of all of the records of one company, Ryan Investments, which had been in existence for less than seven years, and the post-1958 records (at most) of another company, Mawingo, covering a period of under ten years. This was not an oppressive or unreasonable demand.[23] Cf. *Petition of Borden Co.*, 75 F. Supp. 857 (N.D. Ill.) (grand jury subpoena calling for production of 50 tons of records, covering 20-year period, sustained); *In re United Shoe Machinery Corporation*, 7 F.R.D. 756 (D. Mass.) (subpoena for "huge quantities of materials" sustained; pertinent time period reduced from 27 to ten years); *Application of Radio Corporation of America*, 13 F.R.D. 167 (S.D.N.Y.) (18 years); *In re Eastman Kodak Co.*, 7 F.R.D. 760 (W.D.N.Y.) (ten years).

Against this background, the fact that the order did not further limit the subpoena by specifically delineating the precise type of records to be produced did not render it unreasonable.[24] The application of any such

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[23] Moreover, since Mills' estimate of 2,000 pounds had included the records of Zimmerman, Ltd. (which, as noted, were excluded from the final directive) as well as the records pertaining to all 30 years of Mawingo's existence, it is apparent that the documents actually ordered produced by the district court weighed substantially less than that figure.

[24] "The fact that all of the records are demanded does not in and of itself make the subpoena unreasonable or oppressive." *Application of Certain Chinese Family B. & D. Ass'ns.*, 19 F.R.D. 97, 100 (N.D. Cal.).

per se rule would clash with the "broad investigatorial powers [of grand juries] into what may be found to be offenses against federal criminal law." *United States* v. *Johnson,* 319 U.S. 503, 510. There may, of course, be situations where the breadth of the request is so sweeping as to be unreasonable. But such a decision "turns not on any legal absolutism but on evaluative impression." *Schwimmer* v. *United States,* 232 F. 2d 855, 861 n. 3 (C.A. 8), certiorari denied, 352 U.S. 833. Under that standard, this case is not comparable to *Hale* v. *Henkel,* 201 U.S. 43, 76–77. That case involved an antitrust investigation where the subpoena demanded production of all documents passing between one corporation and six other different companies, in addition to all correspondence by the corporation, since its organization, with more than a dozen other companies (including the American Tobacco Company). See *Brown* v. *United States,* 276 U.S. 134, 142. A demand for all the records of a huge company may well render a subpoena vulnerable; on the other hand, where, as here, the companies involved are relatively small, and the order of the court limits the demand, the subpoena is not subject to the same defect.

2. There is similarly no merit to the court of appeals' suggestion that the order was defective for failing to state "with sufficient particularity what Ryan was expected to do" (A. 72). The court did not explain in what way it thought the order insufficiently precise and we are not aware that respondent complained that the order was too vague to guide

good-faith compliance. The order directed respondent to produce before the grand jury in Los Angeles the records of the two designated companies with the exception of records of three specified types (the account books, minute books, and membership lists); to request permission from the Kenyan Registrar of Companies to remove the excepted records from Kenya so as to enable him to produce those too before the grand jury; and, in the event he was unable to secure such permission, to make those particularly described records available to Justice and Treasury Department agents for inspection and copying in Kenya. In short, it was precise and clear.

CONCLUSION

If the Court agrees with the government's contentions discussed in Point I, *supra* pp. 9–26, that the order of the district court was interlocutory and nonappealable, then the judgment below should be vacated and the cause remanded with directions to dismiss the appeal. If the Court concludes that the order was independently appealable, then, for the reasons set forth in Point II, *supra* pp. 26–32, the judgment below should be reversed.

Respectfully submitted.

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